

IN THE SUPREME COURT OF THE STATE OF NEVADA

MORONI CORPORATE INVESTMENTS  
INTERNATIONAL, INC., A NEVADA  
CORPORATION; AND MARTIN G.  
CROWLEY, AN INDIVIDUAL,  
Appellants,  
vs.  
FLOYD EDGEMON, AN INDIVIDUAL,  
Respondent.

No. 57407

**FILED**

OCT 31 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a real property contract action. Tenth Judicial District Court, Churchill County; William Rogers, Judge.

Respondent Floyd Edgemon and Althea Cottam lived together in Cottam's home in Fallon. After Cottam's death in 2005, Edgemon did not make the monthly payments on the home's promissory note, which resulted in default and impending foreclosure. Edgemon met with an attorney, appellant Martin Crowley, to discuss his options regarding the home. Edgemon and Crowley signed an agreement whereby appellant Moroni Corporate Investments International, Inc. (MCI) would pay the arrears to stop the foreclosure sale and continue to make the monthly payments on the note. Crowley is MCI's president. The parties agreed to list the property for sale "immediately" upon Edgemon's appointment as administrator of Cottam's estate and to divide the net proceeds from the sale.

After an increase in the monthly payment amount due and delays in selling the property, however, MCI stopped making the monthly payments. A notice of default was recorded, and MCI eventually purchased the home at a foreclosure sale. MCI later instituted an eviction

action against Edgemon. Edgemon filed a complaint against MCI and Crowley. The district court entered a judgment against MCI and Crowley jointly and severally for damages in the amount of \$20,873.19.

MCI and Crowley appeal, contending that (1) the district court erred in striking both MCI and Crowley's demand for a jury trial, (2) the district court erred in denying MCI's and Crowley's motion for summary judgment, (3) the district court violated MCI and Crowley's due process rights by deciding their motions before the time for filing a reply had expired and by entering orders without MCI and Crowley properly receiving them, (4) Edgemon breached the contract first, which voided the contract prior to any of MCI's alleged breaches, (5) the district court abused its discretion in finding that MCI and Crowley breached their fiduciary duties, (6) the district court abused its discretion in finding that MCI and Crowley breached the implied covenant of good faith and fair dealing, (7) specified damages do not flow from Crowley's alleged legal malpractice, and (8) the district court abused its discretion in calculating damages. We disagree and, therefore, affirm the district court's decision.<sup>1</sup> Because the parties are familiar with the facts and procedural history of this case, we do not recount them further except as necessary for our disposition.

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<sup>1</sup>To the extent that appellants appeal from the district court order denying them a new trial, the order is summarily affirmed, as appellants failed to present any argument concerning it in their opening brief.

The district court did not err in striking both MCI and Crowley's demand for a jury trial under NRCP 38(b) and acted within its discretion in denying their motion for relief under NRCP 39(b)

MCI and Crowley argue that the district court erred in striking MCI and Crowley's separate demands for a jury trial under NRCP 38(b) and denying their joint NRCP 39(b) motion.<sup>2</sup> We disagree.

MCI and Crowley waived their rights to a jury trial because their demands were untimely. See NRCP 38(b) and (d) (parties who fail to demand a jury trial before "entry of the order first setting the case for trial," waive their right to a trial by jury). MCI did not file its demand for a jury trial until 5 days after the district court entered an order first setting the case for a bench trial. Crowley filed his demand even later. Accordingly, the district court properly struck the jury trial demands. See NRCP 38(d); see also Hardy v. First Nat'l Bank of Nev., 86 Nev. 921, 922-23, 478 P.2d 581, 582 (1970).

Alternatively, MCI and Crowley assert that the district court abused its discretion in denying their NRCP 39(b) motion requesting the district court to order a jury trial. MCI and Crowley argue that Walton v. District Court supports the conclusion that the district court abused its discretion by not ordering a trial by jury. 94 Nev. 690, 586 P.2d 309 (1978). We disagree.

In Walton, this court held that no delay, confusion, or surprise would occur by granting a motion pursuant to NRCP 39(b) because the

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<sup>2</sup>MCI and Crowley further argue that the denial of a jury trial violates their Seventh Amendment rights. However, the Seventh Amendment does not apply in this case. See Aftercare of Clark County v. Justice Ct., 120 Nev. 1, 4-5, 82 P.3d 931, 933 (2004) (noting that the Seventh Amendment guarantee of trial by jury does not apply to the states).

district court had initially scheduled a jury trial, and the opposing side had initially agreed to set the matter for a jury trial. 94 Nev. at 695, 586 P.2d at 312. Unlike in Walton, the district court here initially scheduled the matter for a bench trial, and MCI did not communicate that it was requesting a jury trial prior to its late demand. In the joint case conference report, MCI also assented to conduct a bench trial. Unlike the parties in Walton, Edgemon could not assume the district court would hold a jury trial prior to MCI's demands for a jury trial. Therefore, possible confusion and delay could have occurred as a result of granting the NRCP 39(b) motion, and the district court did not abuse its discretion in denying the NRCP 39(b) motion.

The district court did not err in denying summary judgment

MCI contends that there were no genuine issues of material fact for trial, and thus, the district court should have granted its motion for summary judgment.<sup>3</sup> We disagree.

We review a district court's ruling regarding a motion for summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate only

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<sup>3</sup>The parties also dispute whether this court can review a denial of summary judgment. However, such review is proper when raised in an appeal from a final judgment. See GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) (concluding that, although an order denying summary judgment is not independently appealable, this court can review the denial of summary judgment where the issue is properly raised, as here, in an appeal from the final judgment); see also Cromer v. Wilson, 126 Nev. \_\_\_, \_\_\_, 225 P.3d 788, 789-90 (2010) (reviewing denial of summary judgment on issue of liability when appellant properly raised it on appeal from a final judgment pursuant to a jury verdict); Clark County Sch. Dist. v. Virtual Educ., 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (reviewing denial of summary judgment when properly raised on appeal from a final judgment).

where the pleadings and other evidence in the record indicate that no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. Id.

The district court denied MCI's and Crowley's motion for summary judgment after finding that there were genuine issues of material fact regarding whether (1) MCI and Crowley intentionally breached the agreement, (2) Crowley deliberately misled Edgemon, and (3) Crowley and MCI wanted the agreement to fail in order to allow the property to be foreclosed upon. Viewing the pleadings and evidence of record in the light most favorable to Edgemon, the nonmoving party, we find that the record supports the district court's conclusion that genuine issues of material fact remained for trial. See Wood, 121 Nev. at 729, 121 P.3d at 1029. Accordingly, the district court did not err when it denied MCI's and Crowley's motion for summary judgment.

The district court did not violate MCI's and Crowley's due process rights

MCI and Crowley argue the district court violated their due process rights and demonstrated bias when it entered four orders before MCI and Crowley filed their reply motions.<sup>4</sup> They also argue that the court did not properly serve MCI and Crowley with its signed orders, prepared by Edgemon's counsel.<sup>5</sup> We disagree that these acts warrant reversal.

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<sup>4</sup>The orders at issue include: (1) the order denying reconsideration and request for hearing of the order striking the demand for jury trial, (2) the order denying the second motion for reconsideration of the motion for summary judgment, (3) the order denying MCI's and Crowley's motion for summary judgment, and (4) the order denying MCI's and Crowley's motion to alter or amend findings, or in the alternative, motion for a new trial.

<sup>5</sup>These orders include: (1) the order denying the second motion to quash service, (2) the order denying motions to dismiss defendants

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Generally, when a litigant has had an opportunity to present arguments and evidence in support of a requested ruling, has an opportunity to challenge the court's decision on appeal, and fails to demonstrate that the outcome should have been any different, the failure of a court to consider a reply to a motion's opposition does not violate due process guarantees. See Callie v. Bowling, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (noting that procedural due process is satisfied when a party has notice and opportunity to be heard); Edwards v. U.S. I.N.S., No. 91-70002, 1992 WL 4233, at \*1 (9th Cir. Jan. 10, 1992) (explaining that, to prevail on an assertion that the trial court's failure to consider a reply brief resulted in the denial of due process, one must demonstrate prejudice); Belcher v. State, 364 S.W.3d 658, 666-67, n.8 (Mo. Ct. App. 2012) (pointing to criminal and civil cases in which courts concluded that the failure to afford an opportunity to file a reply did not constitute a due process violation). Moreover, service of the notice of entry of order provides actual notice that the district court has entered a written order. See Healy v. Volkswagenwerk, 103 Nev. 329, 330, 741 P.2d 432, 433 (1987); NRAP 4(a)(1) (stating that an aggrieved party in a civil case has 30 days from service of the notice of entry of order is served in which to file a notice of appeal).

Here, despite the district court's apparent failures with regard to the time allotted to file a reply within the Third Judicial District Court Rules (T.J.D.C.R.), we conclude these actions did not prejudice MCI and Crowley. MCI and Crowley did not provide this court with a copy of

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American Legal Services and Crowley, (3) the order denying the motion to dismiss defendant Crowley, and (4) the order denying a motion for more definite statement and alternative motion to dismiss.

several of their proposed replies and altogether failed to demonstrate that, had the court considered their replies, the outcome would have been any different. Moreover, although the district court and Edgemon did not properly serve MCI and Crowley with several of the district court's orders, they received notice of the orders. Accordingly, MCI and Crowley have not demonstrated any due process violations.

The district court's findings in favor of Edgemon's causes of action were not clearly erroneous

When supported by substantial evidence, we will not set aside a district court's findings of fact and conclusions of law, unless clearly erroneous. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

Edgemon did not breach the contract prior to MCI's breaches

MCI contends that it no longer had duties under the contract after Edgemon breached the contract first by failing to list the property for sale "immediately," which voided the contract prior to any of MCI's alleged breaches. We disagree.

A "district court's determination that [a] contract was or was not breached will be affirmed unless clearly erroneous, but the district court's interpretation of the meaning of contractual terms is subject to independent appellate review." Id. As such, we review de novo the interpretation of a contract, which is a question of law. Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). In interpreting a contract, we may review surrounding circumstances to effectuate the intent of the parties when the contract itself is not clear. Id. "A contract is ambiguous when it is subject to more than one reasonable interpretation." Id. Moreover, we construe any ambiguity against the drafter. Id. at 215-16, 163 P.3d at 407.

Here, the agreement states, “the parties further acknowledge and agree that the property shall be listed for sale immediately upon the appointment of Edgemon as administrator.” The contract does not specifically place the burden of listing the property on Edgemon; nor does it specifically define the word “immediately.” Thus, one could attribute the delay in listing the property on the market to either party. We conclude that this portion of the contract is ambiguous because it is subject to two reasonable interpretations, and therefore, we must construe the ambiguity against the drafter, MCI. See id. Under MCI’s interpretation, Edgemon was required to list the property for sale within days of being appointed administrator in order to avoid breaching the contract. Given the absence of language indicating that Edgemon was solely responsible for listing the property for sale, we decline to construe such a strict interpretation of the word “immediately.” As such, we conclude that Edgemon did not breach the contract first.

The district court’s finding that MCI and Crowley breached their fiduciary duties was not clearly erroneous

MCI and Crowley contend that the district court abused its discretion in determining that they breached their fiduciary duties because the evidence presented below instead demonstrates that Edgemon breached his fiduciary duty. We disagree.

Based on evidence in the record, MCI’s and Crowley’s breach was independent of any of Edgemon’s alleged deceptive conduct. The district court found that MCI breached its fiduciary duty under a partnership theory because MCI and Edgemon agreed to perform a partnership through the contract. “[A] partnership is an association of two or more persons to carry on as co-owners a business for profit . . . .” NRS 87.060(1). Here, through their contract, MCI and Edgemon were carrying on the sale of the property and the administration of Cottam’s estate for



profit with each of their interests in half of the proceeds. “The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information . . . .” Clark v. Lubritz, 113 Nev. 1089, 1095, 944 P.2d 861, 865 (1997) (citation omitted).

Review of the record indicates that MCI breached its fiduciary duty to Edgemon by not informing him of material information regarding the property. For example, MCI failed to disclose that it stopped making the monthly payments on the promissory note and did not notify Edgemon regarding the foreclosure sale on the property. Thus, substantial evidence supports the district court’s interpretation that MCI, not Edgemon, breached its fiduciary duties.

The district court also found that Crowley breached his fiduciary duties as Edgemon’s attorney. A fiduciary relationship also exists where one person has a duty to act for or give advice “for the benefit of another upon matters within the scope of the relation[ship].” Stalk v. Mushkin, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (citation omitted). As Edgemon’s attorney, Crowley owed Edgemon an undivided duty of loyalty. Id. Crowley breached his fiduciary duties to Edgemon by failing to disclose that he was MCI’s president or discussing fully with Edgemon his own financial interests in the contract and in MCI. Crowley also never received Edgemon’s informed consent to Crowley’s interests in the agreement. Therefore, the district court’s finding that Crowley breached his fiduciary duty as Edgemon’s attorney was not clearly erroneous.

The district court’s finding that MCI and Crowley breached the implied covenant of good faith and fair dealing was not clearly erroneous

MCI and Crowley argue that the district court abused its discretion in determining that they violated the implied covenant of good faith and fair dealing because Edgemon breached first. We disagree.

The district court determined that MCI was liable under a contract theory and Crowley was liable under a tort theory. “[E]very contract imposes upon the contracting parties the duty of good faith and fair dealing.” Hilton Hotels v. Butch Lewis Productions, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). Where a breach of the implied covenant of good faith and fair dealing is alleged, a plaintiff can make a claim for damages under a contract theory and/or a tort theory. Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 232-33, 808 P.2d 919, 923 (1991). When one party holds “vastly superior bargaining power,” we have extended tort liability for breach of the implied covenant of good faith and fair dealing. Insurance Co. of the West v. Gibson Tile, 122 Nev. 455, 462, 134 P.3d 698, 702 (2006) (quoting Aluevich v. Harrah’s, 99 Nev. 215, 217, 660 P.2d 986, 987 (1983)). The covenant only rises in tort where there is a special relationship between the victim and tortfeasor “characterized by elements of public interest, adhesion, and fiduciary responsibility.” Id. at 461, 134 P.3d at 702 (quoting Great American Ins. v. General Builders, 113 Nev. 346, 355, 934 P.2d 257, 263 (1997)). Tort liability under this covenant is necessary to “protect the weak from the insults of the stronger” in situations involving an element of reliance. Id. at 462, 134 P.3d at 702 (quotation omitted).

As previously discussed, Edgemon did not breach the contract first. Moreover, Edgemon presented evidence at trial that MCI failed to perform under the enforceable contract by instead requiring him to make payments to MCI. Edgemon also demonstrated that MCI allowed the property to go into foreclosure, which defeated the purpose of the contract. Thus, substantial evidence supports the district court’s determination that MCI breached the implied covenant of good faith and fair dealing under a contract theory.

With respect to Crowley, the district court did not abuse its discretion in finding Crowley liable under a tort theory because of the special relationship and fiduciary responsibilities Crowley maintained as Edgemon's attorney. See Insurance Co. of the West, 122 Nev. at 461, 134 P.3d at 702. Crowley had relative bargaining power over Edgemon who relied on his attorney as Edgemon was elderly, legally blind, and unable to read. See id. Crowley did not take into consideration Edgemon's interest in the transaction by failing to disclose that MCI stopped making payments or inform Edgemon of the foreclosure sale. Thus, substantial evidence supports the district court's finding that Crowley breached the implied covenant of good faith and fair dealing.

Because we affirm the district court's judgment in favor of Edgemon on his claims for breach of contract, breach of fiduciary duties, and breach of the covenant of good faith and fair dealing, we need not reach Crowley's remaining argument regarding whether specified damages flowed from his legal malpractice.

The district court acted within its discretion in calculating damages

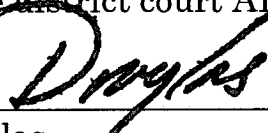
MCI and Crowley argue that the district court erred in determining the amount of damages. We disagree.


"A district court is given wide discretion in calculating an award of damages and an award will not be disturbed on appeal absent an abuse of discretion." Asphalt Prods. v. All Star Ready Mix, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995) (quotation omitted). In calculating damages, the district court took the purchase price of the property at the foreclosure sale and added the amount that MCI paid under the agreement in determining what MCI paid for the property. The district court then subtracted this amount from the appraisal value of the property to determine that the "profit" would have been: \$37,346.38. The

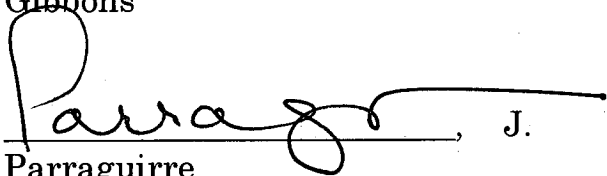
district court properly divided this estimated "profit" between MCI and Edgemon and found it to be \$18,673.19. The district court then determined that the damages should also include \$2,200.00, the amount Edgemon improperly paid MCI. The district court acted within its discretion when it found that MCI and Crowley were jointly and severally liable in the amount of \$20,873.19.<sup>6</sup>

We have considered all of appellants' remaining arguments on appeal and conclude they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. William Rogers, District Judge  
Jonathan L. Andrews, Settlement Judge  
Martin G. Crowley  
Carole Pope  
Churchill County Court Administrator

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<sup>6</sup>In the body of its decision, the district court correctly determined that half of \$37,346.38 is \$18,673.19 on page 15; however, it incorrectly stated the amount was \$18,873.19 on page 17. Edgemon v. Moroni, Case No. 34309 (Decision, September 27, 2010). Nevertheless, the district court correctly calculated the total amount of damages to be \$20,873.19. Id.